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The complexity of issues in many modern civil[1] cases requires that courts have reliable expert assistance. Indeed, expert testimony is required as a legal necessity to maintain some actions and as a practical necessity in many others.[2] The expert witness, consequently, occupies a unique and controversial role in the modern judicial system. Much of the controversy results from the expert's[3] inability to satisfy the conflicting demands of the court and the adversary. Courts expect the expert to provide guidance in the determination of highly technical issues. The adversary, however, having paid for the services of the expert, expects to receive a favorable, partisan presentation. The expert, consequently, has been the subject of extensive commentary and legislation purporting to reconcile this anomaly. No reform suggested by the commentators or attempted by the legislatures, however, has reconciled successfully the competing interests involved in litigation which requires expert testimony.

This Note asserts, through a comparative history, that the expert has a legal duty to the courts analogous to that of the ordinary witness.[4] A statute is proposed to implement this duty.[5] The Note argues that enactment of the proposed statute would best ensure an effective modern civil adjudicatory system.[6]

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1. This Note will consider the role of the expert witness in civil litigation only. A court's ability to compel the testimony of expert or ordinary witnesses in criminal actions raises constitutional issues distinct from the purpose of this Note. For a discussion of the constitutional right to compulsory process in criminal actions, see United States v. Nixon, 418 U.S. 683, 711 (1974).

2. See notes 59-62 *infra*.

3. It is assumed thoughout this Note that "expert witness" refers to a person qualified to give expert testimony. For a review of such qualifications, see 31 AM. JUR. 2d, *Expert and Opinion Evidence* § 26 (1967); MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 13 (2d ed. 1972) [hereinafter cited as MCCORMICK].

4. See notes 24-27 & accompanying text *infra*.

5. See text accompanying notes 70-73 *infra*.

6. See text accompanying notes 93-102 *infra*.

Comparative History: The development of the ordinary and the expert witness

Comparison of the development of the role of the expert witness to the development of the role of the ordinary witness demonstrates that each has followed a remarkably parallel analytical pattern of growth.[7] Comparison also demonstrates that when problems similar to those confronting the expert witness today threatened the continuing vitality of the ordinary witness, the English Parliament successfully resolved all conflicts by creating a duty whereby every citizen must testify when properly summoned.[8]

The Development of the Ordinary Witness

Permissive Use of the Testimony of the Ordinary Witness

There is little evidence of the first actual appearance of the ordinary witness, however, it is generally agreed that use of oral testimony was common by the early seventeenth century.[9] "This relatively late appearance of oral evidence in the common law, was due to the firmness with which the common law adhered to the view that the jurors were as much witnesses as judges of fact."[10] The common law did, however, make use of "preappointed witnesses,"[11] who, unlike the modern ordinary witness "did not supply evidence upon which the court could decide,"[12] but simply swore an oath attesting to their belief in the plaintiff's claim or the genuineness of a deed or transaction in dispute. The function of the preappointed witnesses was rigidly defined.[13] Beyond resort to the preappointed witnesses who deliberated with the regular jurors,[14] further attempts by litigants to influence the

7. Exact temporal continuity of the developing roles of the ordinary and the expert witness is irrelevant to the approach taken herein.

8. See notes 24-30 & accompanying text *infra*.

9. 8 J. WIGMORE, EVIDENCE 62 (McNaughton Rev. 1961) [hereinafter cited as 8 WIGMORE]; 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH COMMON LAW 178 (1926) [hereinafter cited as 9 HOLDSWORTH].

10. 9 HOLDSWORTH, *supra* note 9, at 131.

11. "Preappointed witness" is a term adopted from Holdsworth. *See* 9 HOLDSWORTH, *supra* note 9, at 177. The three major types of preappointed witnesses were: (1) the *secta*, who swore to their belief in plaintiff's claim; (2) the *deed witnesses*, who swore to the genuineness of the document they had signed; and (3) the *transaction witnesses*, who swore to the occurence of the transaction they witnessed. *Id.* at 178.

12. *Id.*

13. *Id.*

14. 8 WIGMORE, *supra* note 9, at 63. The preappointed witnesses were originally called along with the jurors. It was only as their numbers became impractical that they were summoned separately. *Id.*; 9 Holdsworth, *supra* note 9, at 179.

jury were unwelcomed by the courts.[15] Indeed, a person who volunteered information to the jury was vulnerable in an action for the crime of maintenance.[16] Oral evidence was only permitted as a means of impeaching the jurors.[17]

By the seventeenth century, exclusion of oral evidence was, however, "fast ceasing to correspond with the more advanced juridical needs and ideas of the time,"[18] because "the jury was less and less able to do justice to the cause through the means of its own neighborhood knowledge."[19]

Compelling the Testimony of the Ordinary Witness

When oral evidence was first introduced it was inconceivable that anyone could be compelled to testify.[20] This attitude was a direct result of the limitations inherent in the concept of the preappointed witnesses. Courts compelled witnesses only when the testimony coincided with an existing category of the preappointed witnesses.[21] Thus, the first witnesses compelled by the courts were the "deed witnesses" who by affixing their signatures to the document had agreed to testify.[22] As late as 1455, however, it was said that "no one can compel another to swear with him."[23]

Prompted by developments in the law, the need to compel the attendance of witnesses became critical. As the jury lost its dual func-

15. The first witnesses introduced by the litigants were considered "meddlers" by the courts. 8 WIGMORE, *supra* note 9, at 64.

At this time the jury continued to function in its dual capacity of trier and witness. The courts persisted in the belief that the jury's source of information was not a proper subject of inquiry. Irregular methods of influencing and intimidating the jury were common. See, 9 HOLDSWORTH, *supra* note 9, at 181-182.

16. 8 WIGMORE, *supra* note 9, at 65; 9 HOLDSWORTH, *supra* note 9, at 182; 3 HOLDSWORTH, *supra* note 9, at 649.

17. 9 HOLDSWORTH, *supra* note 9, at 183.

18. *Id.*

19. 8 WIGMORE, *supra* note 9, § 2190. The recognition that the jury was unable to function properly without the aid of the ordinary witness is fundamentally parallel to the present status of the expert witness. The judiciary's power to compel testimony is equally as appropriate for the present problem as it was for the former. See text accompanying notes 57-69 *infra*.

20. *Id.* In an early case (1291) when the King attempted to compel the testimony of certain magistrates "all of them asserted that it was thing unheard of that they should be compelled to swear." 9 HOLDSWORTH, *supra* note 9, at 179-80.

21. See note 11 *supra*. The preappointed witnesses had provided mere assertory oaths as opposed to testimony under oath. The courts would compel ordinary witnesses, therefore, only where by their actions or signature they had consented to be called. 9 HOLDSWORTH, *supra* note 9, at 180.

22. *Id.*

23. *Id.*

tion, the law grew to require testimony to maintain certain actions,[24] and the injustice to a party who was unable to compel attendance of witnesses became apparent. Moreover, there was concern that the close relationship of the party and the witness often resulted in overzealous and coercive testimony.[25] Finally, witnesses continued to suffer under the threat of an action in maintenance if the party for whom they had testified should fail in the controversy.[26] In response to these developments and continuing concerns Parliament passed the Act of 1562-63.[27]

The Act of 1562-63, insofar as it pertained to witnesses, was based on the new, fundamentally different premise that every citizen had a duty to testify when summoned.[28] The recognition of this duty protected the interests of both the litigant and the witness, for "what a man does by complusion of law can not be called maintenance."[29] The duty to testify represented a revolutionary change in the concept of the witness' role. The demand to testify did not come from a particular party, but rather "from the community as a whole—from justice as an institution and from law and order as indispensible elements of civilized life."[30]

Having recognized the duty to testify, Parliament and the courts could freely fashion new rules specifically designed to protect the competing interests of the court, the litigants, and the witnesses.[31] The Act of 1562-63 contained two important innovations that have remained part of the law. First, the offense of perjury was created to provide the courts with a method of exerting direct control over testimonial reliability.[32] Second, witness fees were initiated in order to reduce the magnitude of the imposition on the witness.[33] Since the Act of 1562-63, a vast body of law has grown around the ordinary witness. Courts

24. *Id.* at 185. The obvious example of such actions was the criminal charge of treason which, by law required the testimony of two witnesses.

25. See note 15 & accompanying text *supra*.

26. The threat of liability for maintenance resulting in the unavailability of needed testimony was a critical factor in prompting legislative reform. *See* 9 HOLDSWORTH, *supra* note 9, at 182; 8 WIGMORE, *supra* note 9, at 65.

27. 5 ELIZ. I, c. IX (1562).

28. 9 HOLDSWORTH, *supra* note 9, at 185. To implement this change Parliament adopted the "subpoena" which had been used effectively by the Chancery courts for over a century. *Id.*

29. 8 WIGMORE, *supra* note 9, § 2190.

30. *Id.* § 2192.

31. For a discussion of the early development of rules governing compulsion and competency, see 9 HOLDSWORTH, *supra* note 9, at 177-203.

32. 5 ELIZ. I, c. IX, § I (1562).

33. 5 ELIZ. I, c. IX, § XII (2) (1562). *See also* Philler v. Waukesha County, 139 Wis. 211, 216, 120 N.W. 829, 831 (1909) (discussing the fees provision of the Act of 1562-63).

have defined competency[34] and relevancy, have created exemptions and privileges,[35] and have recognized exceptions to the duty to testify[36] in an effort to adjust inequities.

The Expert Witness

Early in the development of the role of the ordinary witness the courts confined the scope of admissible testimony to facts within the actual knowledge of the witness to the exclusion of any opinions or inferences.[37] Yet, as early as the fourteenth century the courts recognized that the opinion of an expert was admissible as an exception to the rule.[38] The first expert witnesses were called exclusively by the courts and were "regarded as expert assistants to the court."[39] Their status as court officials permitted the introduction of the opinion testimony.

Permissive Use of Expert Testimony

Expert testimony was not used extensively until the seventeenth century when juries had come to rely commonly on oral evidence.[40] By then, however, the expert witness had evolved from court officer to adversary witness.[41] In addition, the concept of expert testimony had expanded to include not only the formal professions but the newly developing areas of science as well.[42] Some conservative courts voiced

34. *See generally*, MCCORMICK, *supra* note 3, §§ 61-71.

35. *Id.* §§ 72-143.

36. 8 WIGMORE, *supra* note 9, §§ 2204-2207.

37. 9 HOLDSWORTH, *supra* note 9, at 211; MCCORMICK, *supra* note 3, § 11. The original opinion rule excluded only conjecture not based on observation in contrast to the broader present day rule which forbids inferences and impressions. *See* Note, *The Opinion Rule in California and Federal Courts: A Liberal Approach*, 9 U. CAL. D.L. REV. 233, 234-36 (1976) (discussing the different categories of the term "opinion").

38. 9 HOLDSWORTH, *supra* note 9, at 212.

39. *Id.*

40. *Id. See also* Note, *The Opinion Rule, in California and Federal Courts: A Liberal Approach*, 9 U. CAL. D.L. REV. 233, 241 (1976).

41. *See Ex parte* Dement, 53 Ala. 389, 395-97 (1875) (quoting extensively from ORDRONEAUX, JURISPRUDENCE OF MEDICINE 138 (1869)).

42. *See* 9 HOLDSWORTH, *supra* note 9, at 212. The history of the handwriting expert illustrates the courts' early reluctance to permit expert testimony. When first introduced in the 17th century, comparative handwriting analysis was permitted only if the "expert" had actually seen the person write so that the "expert" testimony was merely corroborative. By the 18th century the testimony remained merely corroborative, but it was recognized that handwriting experts could form an opinion from sources other than personal observation. In the early 19th century the courts freely admitted the testimony of persons who knew the handwriting in question but excluded any opinions based solely on comparison. It was only when the legislature acted that testimony based purely on a comparative analysis was openly admitted. *Id.* at 212-14 (citing 17 & 18 VICT. c. 125, § 27 (1854)).

their distrust of expert testimony.[43] Most courts, however, merely began to scrutinize the expert's qualifications more strictly and to narrow the permissible subjects of expert testimony.[44] With the arrival of the adversary expert the court-appointed expert became rare.

In addition to questions regarding permissibility and propriety of expert testimony, the courts were confronted with a concern unique to the role of the expert witness. Expert witnesses demanded compensation for their professional services in addition to the compensation provided the ordinary witness. The courts responded with varying degrees of sympathy,[45] but avoided complete resolution of the issue.[46] The problem was unnecessarily complicated by the "custom amongst English courts to treat physicians and lawyers as exempt from coerced attendance on the same terms as other witnesses."[47] The English rule, however, was not followed in most American jurisdictions.[48] Many cases have treated compensation of expert witnesses as an issue inextricably intertwined with the court's ability to compel expert testimony.[49] The issue of compensation, therefore, will be examined in relation to the court's power to compel expert testimony.

43. *See, e.g.*, State v. Watson, 65 Me. 74, 76 (1876) (referring to expert testimony as "the vain babblings and oppositions of science falsely so called").

44. *See* MCCORMICK, *supra* note 3, at 29-31 (present day standards); 31 AM. JUR. 2d, *Expert and Opinion Evidence* §§ 26-32 (1967).

45. See LAWSON, THE LAW OF THE EXPERT AND OPINION TESTIMONY 261-64 (1886) for cases recognizing the expert's property interest. The leading case on the property value of an expert's knowledge is Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 105 A. 630 (1918). The English rule, adopted by the Pennsylvania court, is stated in Webb v. Paige, 1 Car. & Kir. 23 (1843). *But cf.* Dixon v. People 168 Ill. 179, 48 N.E. 108 (1897); Buchman v. State, 59 Ind. 1 (1877); Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121 (1907) (providing only for ordinary compensation for expert testimony).

46. The courts' failure to resolve completely the professional's compensation problem is evidenced by the continuing dissatisfaction of such witnesses. *See* Byrd, *Knowledge for Sale—The Dilemma of the Expert Witness*, 6 TRIAL, May 1976, at 59, 61 (suggesting some additional guidelines); Note, *Contingent Fees for Expert Witness in Civil Litigation*, 86 YALE L.J. 1680, 1685-88 (1977); Note, *The Contingent Compensation of Expert Witnesses in Civil Litigation*, 52 IND. L.J. 671 (1977).

47. Philler v. Waukesha County, 139 Wis. 211, 215, 120 N.W. 829, 830-31 (1909). *See also* Kraushaar Bros. & Co., Inc., v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165 (1946) (following the English rule).

48. *See, e.g., Ex parte* Dement, 53 Ala. 389 (1875); Flinn v. Praire County, 60 Ark. 204, 29 S.W. 459 (1895); Bd. of Comm'rs v. Lee, 3 Colo. App. 177, 3 P. 841 (1893); Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897); Burnett v. Freeman, 125 Mo. App. 683, 103 S.W. 121 (1907).

49. *See* 8 WIGMORE, *supra* note 9, § 2203 (stressing that the question is not just whether the expert deserves larger compensation, but whether the expert is subject to compulsory process if no prior arrangement for compensation has been made). *See also* Annot., 77 A.L.R.2d 1182, 1184-91 (1961).

Compelling Expert Testimony

When expert testimony was originally introduced, it was inconceivable that any expert could be compelled to testify.[50] Differences perceived by courts between the expert and the ordinary witness[51] made it impossible to compel the expert under prevailing concepts of the power of the subpoena. The courts considered the availability of expert testimony as essentially a matter of contract between the expert and the party.[52] As the need for expert testimony increased, the courts abandoned this early position and compelled the testimony of experts, but only to the extent the expert could be considered an ordinary witness.[53] Consequently, the first experts compelled were treating physicians who had observed some facts relevant to the pending controversy, notwithstanding that the facts were perceptible only to the trained eye.[54] In addition, the concept of "facts" or "actual knowledge" gradually expanded to encompass previously formed expert opinions.[55] No

50. "[T]he private litigant has no more right to compel a citizen to give up the product of his brain, than he has to compel the giving up of material things." Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 442, 105 A. 630, 631 (1918).

51. "There is a distinction between the case of a man who sees a fact, and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion about a matter with which he is particularly conversant from the nature of his employment in life." *Ex parte* Dement, 53 Ala. 389, 392 (1875). This difference is the basis for much of the controversy surrounding the role of the expert witness and the fundamentally different treatment of the expert and the ordinary witness.

52. Pennsylvania Co. v. Philadelphia, 262 Pa. 439, 442, 105 A. 630, 631 (1918). ("in each case it is a matter of bargain"); Kraushaar Bros. v. Thorpe, 296 N.Y. 223, 72 N.E.2d 165 (1946); Hull v. Plume, 131 N.J.L. 511, 37 A.2d 53 (1944); Philler v. Waukesha County, 139 Wis. 211, 120 N.W. 829 (1909); LAWSON, THE LAW OF EXPERT AND OPINION EVIDENCE 262 (1886) ("[i]t being purely [a] matter of conventional arrangement between professional experts and those who desire to employ them as witnesses, both in regard to their acting as such, and also their making preparation to enable them to give such testimony").

53. Annot., 77 A.L.R.2d 1182, 1184-87 (1961). "A physician who has acquired knowledge of a patient or of specific facts in connection with a patient may be called upon to testify to those facts without any compensation other that the ordinary witness receives for attendance upon court." City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 234, 231 P.2d 26, 29 (1951).

54. City and county of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1961); Annot., 77 A.L.R.2d 1182, 1184-87 (1961). *See also* Board of County Comm'rs v. Lee, 3 Colo. App. 177, 32 P. 841 (1893); Swope v. State, 145 Kan. 928, 933, 67 P.2d 416, 418 (1937) (radiologist compelled: "[t]he expert is not asked to render professional services as a physician or chemist or engineer; he is asked merely, as other witnesses are, to testify what he knows or believes"); Mount v. Welch, 118 Or. 568, 247 P. 815 (1926); Note, *Requiring Experts to Testify in Maine*, 20 ME. L. REV. 297, 300-02 n.19 (1968) (collecting cases).

55. In a recent federal case, Kaufman v. Edelstein, 539 F.2d 811 (2d Cir. 1976), Judge Friendly upheld the lower court's refusal to quash the subpoenas of two computer consultants on the basis that their previously formed opinions constituted relevant information. The case is unique in two respects. First, the United States government was the plaintiff in a civil antitrust action from which the motions to quash arose. *See* United States v. I.B.M. Corp., 406 F. Supp. 178 (1976). Second, compensation for the consultants had been guaran-

jurisdiction to date, however, has been willing or able to compel the expert where preparation or examination is required to enable the expert to form an opinion.[56]

The Parallel

The present treatment of expert witnesses has caused the courts, legislatures, and commentators to recognize the need for reform,[57] but none has recognized the remarkable resemblance of the modern concerns surrounding the expert witness and the ancient concerns surrounding the ordinary witness immediately preceding the sweeping reforms of the Act of 1562-63.[58]

Expert testimony is now required by law to maintain certain causes of action[59] and is practically indispensable in many others.[60] It is unfair to a party that a cause of action be allowed to flounder because of an expert's refusal to testify.[61] The jury, as a result of the

teed. 539 F.2d at 813. Judge Friendly took the opportunity to discuss, in general terms, the court's power to compel expert testimony, 539 F.2d at 821-22, causing great concern to Judge Gurfein. 539 F.2d at 822-24. *See generally* Note, *Compelling Experts to Testify: A Proposal*, 44 U. CHI. L. REV. 851, 854 (1977) (discussing current approaches).

56. *See* Annot. 77 A.L.R.2d 1182, 1189 (1961).

57. *See* Holschuh, *Advocacy in the Preparation and Presentation of Medical Evidence*, 21 OHIO ST. L.J. 160 (1960) [hereinafter cited as Holschuh]; Markus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520, 532-33 (1965); Ordover, *Expert Testimony: A Proposed Code for New York*, 19 N.Y.L.F. 809 (1974); Peck, *Impartial Medical Testimony: A Way to Better and Quicker Justice*, 22 F.R.D. 21, 22 (1959) [hereinafter cited as Peck]; Note, *Requiring Experts to Testify in Maine*, 20 M. L. Rev. 297 (1968); Note, *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 YALE L.J. 1680 (1977) [hereinafter cited as *Contingent Fees for Expert Witnesses*]. The court's reaction has been to assert its authority to call impartial experts. Annot. 95 A.L.R.2d 390, 391-94 (1964); 31 AM. JUR., *Expert and Opinion Evidence* § 8 (1967). *See also*, Note, *The Trial Judge's Use of His Power to Call Witnesses*, 51 NW. U.L. REV. 761 (1957); Note, *Judicial Authority to Call Expert Witnesses*, 12 RUTGERS L. REV. 375 (1957). The legislatures have reacted by promulgating statutes that affirm the court's power to appoint impartial experts. *See, e.g.*, FED. R. EVID. 706; CAL. EVID. CODE §§ (West 1966); R.I. GEN. LAWS 9 - 17-19 (Supp. 1976); UNIFORM RULE OF EVIDENCE § 706 (1974).

58. See notes 24-26 & accompanying text *supra*.

59. For example, expert testimony is required in some malpractice actions. *See, e.g.*, Oleksiw v. Weidener, 8 Ohio App. 2d 199, 195 N.E.2d 813 (1964); Liberty Mut. Ins. Co. v. Industrial Accident Comm'n, 33 Cal. 2d 89, 95, 199 P.2d 302, 307 (1948).

60. "The use of experts in litigation has become almost a fixture in many areas—antitrust, condemnation, desegregation, malfunction and defects in design in products liability . . . ." Note, *The Contingent Compensation of Expert Witnesses in Civil Litigation*, 52 IND. L.J. 671, 686-87 (1977). *See also* 9 HOLDSWORTH, *supra* note 9, at 212-14; Foreman, *How to Choose and Use Plaintiff's Experts*, 12 FORUM 155, 156 (1976) (expert testimony required in most aviation accident cases).

61. Courts have refused to compel requested expert testimony and subsequently enter a directed verdict or nonsuit because the cause of action cannot otherwise be established. *See, e.g.*, Karp v. Cooley, 349 F. Supp. 827 (S.D. Tex. 1972), *cert. denied*, 419 U.S. 845 (1974) (medical malpractice). As to the extent of the problem, see Note, *Compelling Experts to Testify: A Proposal*, 44 U. CHI. L. REV. 851, 853-59 (1977); Starks, *Is It Error to Discuss*

increasingly complex nature of modern litigation, is unable to function properly without the aid of experts.[62] In addition, great concern has been expressed regarding the close relationship between the party and the expert and the resulting overzealous, partisan testimony.[63] Finally, there is concern over the absence of an adequate procedure to compensate the expert who, in many jurisdictions, is entitled only to ordinary witness fees.[64]

When similar concerns threaten the utility of the ordinary witness, Parliament successfully resolved them by recognizing that every citizen owed a duty to testify when properly summoned.[65] Underlying Parliament's action was the realization that the role of the ordinary witness should be defined by the needs of the courts and the public and not merely by the needs of an individual litigant.[66] The duty to testify and the court's ability to compel testimony ensured an effective civil adjudicatory process at minimal cost to the public.

The parallel assumption, that the *expert* has a duty to testify when specific expert evidence is necessary to a proper adjudication of an action, has not been accepted by the courts or legislatures nor suggested by the commentators. Many of the professed solutions still consider that the issue is governed exclusively by the needs of the party.[67] Other reforms, attempting to protect the interest of the court in obtaining reliable expert testimony, have ignored the parties' interests.[68] Because all reforms suggested or enacted to date have been designed to resolve only one or two narrow issues within the total controversy surrounding the role of the expert witness, none has fully reconciled the

Conspiracy of Silence in a Malpractice Trial?, 14 CLEV.-MAR. L. REV. 534, 540-41 n.32 (1965).

62. "In the context of our complex modern industrial society the need for expert assistance in resolving complicated disputes is readily apparent." Ordover, *Expert Testimony: A Proposed Code for New York*, 19 N.Y.L.F. 809, 809 (1974).

63. Peck, *supra* note 57, at 22-23; Holschuh, *supra* note 57, at 173.

64. See note 54 & accompanying text *supra*. Many states have provided for compensation of experts in an amount in excess of ordinary witness fees. *See* Note, *Compelling Experts to Testify: A Proposal*, 44 U. CHI. L. REV. 851, 856 n.18 (1977) (collecting relevant statutes).

65. See notes 27-30 & accompanying text *supra*.

66. See note 28 & accompanying text *supra*.

67. *See, e.g.*, Note, *Requiring Experts to Testify in Maine*, 20 M. L. REV. 297 (1968) (proposed statute addressed entirely to the expert and litigant's inability to arrive at a satisfactory contract). The use of contingent fees to reimburse expert witnesses who testify on behalf of indigent litigants is widely prohibited but is suggested as a remedy to the indigent's problem. *See, Contingent Fees for Expert Witnesses, supra* note 57; Note, 1977 WIS. L. REV. 603 (1977).

68. Court appointment of experts is explicitly designed to avoid the problems of the adversary expert.

variety of competing interests involved.[69]

Proposed Reform

The success of the Act of 1562-63, regarding the testimony of ordinary witnesses, can be repeated by a statutory resolution of the present controversy surrounding the expert witness. The same fundamental change in approach is required. The following proposed statute incorporates the duty to testify and the language and concepts of existing statutes[70] in an attempt to implement this fundamental change. The proposal is intended to be representative of the kind of statute needed to accomplish adequate reform in the law. It is not intended to be the definitive resolution, but it does indicate the different provisions which should be included in any such attempt.

The Statute

i.) Upon motion by any party to an action asserting that testimony by an expert on the facts involved would be of material aid to the just determination of the pending controversy the court shall subpoena the experts selected by the parties.

ii.) Any person so subpoenaed who is subsequently required to testify; or who is required to attend the taking of his or her deposition; or who has been required to stand ready to testify; *and* who is qualified as an expert witness shall be entitled to expert witness fees

[Alternative I:] as provided by section ———.
[Alternative II:] as set by the court on a per diem per mile basis.

Said fees shall be tendered by the party calling the expert and shall be charged thereafter in like manner as other costs.

iii.) In addition to the fees provided by subsection (ii), any expert so called shall be entitled to reasonable compensation for any preparation, examination, or inspection required to enable that expert to formulate an opinion or interpretation on the matter in issue, whether required by the party calling the witness in preparation for trial or as a basis for the expert's testimony at trial. The sum shall be fixed by the court at pretrial conference and paid by the party requesting that such preparation, examination, or inspection be made. In fixing the amount to be charged the court shall consider:

a.) Any agreement between the party and the expert, but the court shall not be bound thereby;[71] and,

69. See notes 80-93 & accompanying text *infra*. Other legislative reforms, such as statutes providing for expert witness fees, are obviously narrow.

70. UNIFORM RULE OF EVIDENCE 706 (1974); CAL. EVID. CODE §§ 730-33 (West 1966); CAL. GOV'T CODE § 68092.5 (West 1976); FED. R. EVID. 706.

71. This factor recognizes the need to permit litigants and counsel to agree to pay an

b.) The fees normally charged by an expert of like stature in the profession, trade, or calling;[72] and

c.) The ability of the party to pay.[73]

iv.) Should any expert so subpoenaed be unwilling to respond, the court shall, upon motion to quash, refuse to compel the expert only if the court's interest in arriving at a just resolution of the pending controversy can be adequately assured without requiring the attendance and services of the expert selected by the party.

v.) Nothing in this statute is intended to limit the court's ability to call an expert of its own selection.

The Effects of the Proposal

The provisions of the proposed statute will relieve the controversy surrounding the expert witness by adopting the advantages of both the court-appointed expert and the adversary expert. Consequently, the chief merit of the proposal is not the resolution of any particular issue or conflict, but is rather the reconciliation of all the competing interests involved in litigation requiring expert testimony to insure an effective civil-adjudicatory system. The goals of an effective civil adjudicatory system may be summarized as follows:[74] (1) access to the judicial system;[75] (2) encouragement of settlement;[76] (3) deterrence of frivolous claims;[77] and (4) promotion of testimonial reliability.[78] Each of these goals is a step towards the attainment of the ultimate goal—truth.[79] The achievement of an effective modern civil adjudica-

expert the sums he or she requests where cooperation is essential. *But cf.* note 102 & accompanying text *infra* (experts may still slant reports).

72. Experts who are renowned in their field should be awarded greater compensation to deter litigants from summoning the most eminently qualified experts where their high quality assistance is not necessary.

73. Consideration of this factor maximizes access to the courts. *See* note 95 & accompanying text *infra* (only genuine inability to pay will influence fees set by courts.).

74. The goals of an effective modern civil adjudicatory system used in this Note were derived from *Contingent Fees for Expert Witnesses, supra* note 58.

75. Equal access to the courts is not a constitutional right in the context of civil litigation. If, however, access is denied by monetary barriers and the court provides the *only* forum for redress, then due process is denied. Boddie v. Connecticut, 401 U.S. 371, 374 (1971). *Boddie* has been strictly limited to cases where the court holds a monopoly on the means of redress. United States v. Kras, 409 U.S. 434, 435-36 (1973). The Court's decision in *Boddie*, however, affirmed that access to the judicial system is a major concern. *See* Note, 1977 WIS. L. REV. 603, 603-09 (1977).

76. Peck, *supra* note 57, at 26.

77. *Contingent Fees for Expert Witnesses, supra* note 57, at 1685.

78. *Id.*

79. "Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly predictable manner." Boddie v. Connecticut, 401 U.S. 371, 374

tory system is frustrated by treating the expert solely as the adversary expert or the court-appointed expert.

The Court-Appointed Expert

Resort to the court-appointed expert relieves many of the concerns surrounding the use of the adversary expert and has, therefore, been considered an "equitable and forward-looking technique for promoting the fair trial of a lawsuit."[80] It does so, however, at great cost to the adversary process and the system of trial by jury. The court-appointed expert, therefore, is not and cannot be a final resolution.[81]

Court appointment of experts more adequately assures equal access to the courts by providing an alternative to litigants who are unable to obtain needed expert assistance on their own. However, because the courts are enpowered to exercise broad discretion in determining whether to appoint experts,[82] equal access is by no means guaranteed. Similarly, early settlement of claims is encouraged where the court appoints an impartial expert. Exaggerated reports, which inevitably discourage settlement, are deterred with a varying degree of success by threatening exposure when the issue is reviewed by the court-appointed expert. The effect, however, is to transform the 'trial by jury' into a trial by the court's expert.[83] Moreover, frivolous claims are not effectively discouraged because court-appointed experts are so rarely utilized[84] they offer no real threat that the adversary expert's report will be subject to "impartial" evaluation. Finally, the reliability and credibility of individual expert testimony may improve, but where competent experts in a field are divided legitimately over an issue, the search for truth suffers if the adversaries cannot present both sides of the technical issue.[85]

(1971). "The concern expressed on this point invites the reminder that a trial is a search for truth, not a game of chance." Peck, *supra* note 57, at 25.

80. 31 AM. JUR. 2d, *Expert and Opinion Evidence.* § 8, at 502 (1967).

81. Because the court-appointed expert may have an adverse impact on the jury, see note 83 & accompanying text *infra*, and the adversary system, see note 92 & accompanying text *infra*, the court-appointed expert is intended to be used only when the testimony of the experts called by the litigants differs greatly. *See* Peck, *supra* note 57, at 22-23; Ordover, *Expert Testimony: A Proposed Code for New York*, 9 N.Y.L.F. 809, 825, 830 (1974).

82. Courts have wide discretion in determining whether to appoint experts. Scott v. Spanger Bros., 298 F.2d 928 (2d Cir. 1962) (appointment of "plaintiff's doctor" not error); Annot., 95 A.L.R.2d § 390, 398-402 (1964).

83. Holschuh, *supra* note 57, at 171-73.

84. *Contingent Fees for Expert Witnesses, supra* note 57, at 1687, 1696 n.78.

85. When legitimate differences exist in the field "then random selection of a supposedly impartial expert may favor that party whose position corresponds to the expert's predilections." *Id.* at 1691.

The Adversary Expert

The goals of an effective, modern, civil adjudicatory system suffer far more through use of the adversary expert than through use of the court-appointed expert. Indeed, the inability of the adversary expert to satisfy modern judicial needs explains the resurgence of the court's power to appoint an expert of its own selection.[86]

Use of the adversary expert can deny equal access to the courts. Expert assistance can be very costly and the necessity of paying an expert's fee can "deny many potential litigants the opportunity to assert their claims in court."[87] Moreover, access may be denied by the inability to compel the attendance of an expert whom the party feels would provide favorable testimony.[88] More importantly, however, use of the adversary expert discourages settlement and encourages frivolous claims. Exaggerated reports by partisan adversary experts discourages settlement by making offers and demands unnecessarily divergent.[89] Frivolous claims are encouraged because exaggerated reports often go undetected.[90] Finally, but by no means of least significance, the adversary expert may color testimony to best present the client-litigant's interest.[91] Testimonial reliability is undermined, thereby obstructing the attainment of the ultimate goal—truth.

The Effect of Enacting the Proposed Statute

The proposed statute insures an effective modern civil adjudicatory system by preserving the role of the adversary while incorporating the advantages of the court-appointed expert. It does so by making the assumption that the expert owes a duty not to any one particular litigant, but to the courts and the public, while at the same time preserving the adversarial determination of the need for expert evidence. The parties will continue to select the experts to be summoned.[92]

86. "The appointment of disinterested *expert witnesses* by the Court is one of the expedients employed for reforming the defects of the partisan system of providing . . . testimony." 9 J. WIGMORE, EVIDENCE § 2484, at 270 (3d ed. 1940). *See also* Peck, *supra* note 57, at 22-23.

87. *Contingent Fees for Expert Witnesses, supra* note 57, at 1680-81 (cost of expert testimony as a denial of access).

88. See note 62 & accompanying text *supra*.

89. Peck, *supra* note 58, at 25-27; *Holschuh, supra* note 58, at 171-72.

90. Holschuh, *supra* note 57, at 175.

91. *Contingent Fees for Expert Witnesses, supra* note 57, at 1688-95 (close association with one party causes expert to consciously or unconsciously modify his or her opinion).

92. "The adversary system is vitally important and should be maintained . . . ." Holschuh, *supra* note 57, at 177. "The choice of experts should be left to the litigants who can best determine their own interests." Note, *Requiring Experts to Testify in Maine*, 20 MAINE L. REV. 297, 303 (1968). The court, moreover, is not equipped to choose an appropriate expert and often has trouble doing so. *See* Annot., 95 A.L.R.2d 392 (1964).

Equal access to the courts is facilitated under the proposal because the unwillingness of a particular expert to testify would no longer prevent the fair trial on the merits of any action. Litigants will not be required to secure the consent of the expert by contract before necessary evidence can be obtained.[93] Furthermore, the proposal will minimize the effect that the high cost[94] of expert assistance has on access to the courts. Courts are empowered to consider the litigant's ability to pay in determining the amount of compensation to be charged.[95] Under court supervision inflation of costs based on the unique expert's veto power over the proper presentation of evidence on a necessary element of the litigant's cause of action is removed. Costs consequently will more adequately approximate just compensation. Finally, the proposal recognizes that the most helpful expert assistance requires some preparation, examination or inspection before trial and not just testimony at trial.[96] Preparation, examination, and inspection is therefore included in the duty owed by the expert to the court and may be compelled where the court's interest in arriving at a just resolution so dictates. Equal access to the courts, therefore, is assured under the proposal by minimizing the effect of costs[97] and the unwilling expert and by eliminating the possibility that a willing expert who has knowledge necessary to testify on the issue cannot be located.

Achievement of the other three goals of an effective civil adjudicatory process is obstructed under the present adversary-expert approach

93. See note 53 & accompanying text *supra*.

94. *See Contingent Fees for Expert Witnesses, supra* note 57, at 1681 n.4 (cost of expert testimony second only to attorney's fees); Foreman, *How to Choose and Use Plaintiff's Experts*, 12 FORUM 155, 157 (1976) (aviation expert's normal fee is $400 a day plus expenses).

95. It is not suggested that the court will act to arbitrarily restrain prices. It is merely asserted that in those few cases where a litigant is genuinely unable to meet the normal cost of expert assistance that the court may consider that fact in setting the fees to be charged.

96. "In the realms of medicine, law, science, and many other callings where highly specialized knowledge is essential, only the most eminent are competent to answer ex tempore and defend impromtu opinions upon cross-examination . . . ." Krauschaar Bros. v. Thorpe, 296 N.Y. 223, 225, 72 N.E. 2d 165, 166 (1947). Several commentators have suggested that experts always prepare before testifying, whether compensated or not. "Experts are always impelled to prepare adequately for trial out of a desire not to appear foolish in public." Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 934-35. The proposal, therefore, would more adequately compensate experts who now may be called to testify without payment for preparation which is not demanded, but nonetheless performed.

97. An absolute guarantee of access to the courts is not possible. Costs, including that of the expert, act as a barrier to the poor litigant. One possible solution for the plaintiff who is unable to pay any amount would be to provide county funds for the initial compensation of experts. These funds could be reimbursed by the litigant, presumably out of sums eventually awarded. The rights of the poor or indigent defendant could be protected by expanded discovery of the opponent's expert. *See generally* Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

by the partiality of expert reports and testimony resulting from the expert's close association with the party who pays his or her fee.[98] To prevent the extreme advocacy[99] by experts that this agency-like relation fosters, the proposal provides that all fees would be controlled by the courts. With the amount of compensation fixed by the courts, experts would feel less bound to the adversarial role and thus have less incentive to exaggerate.[100] More objective expert evaluation could result in less divergent settlement positions and speed the identification of frivolous claims.[101] One may reasonably believe that experts will develop a sense of responsibility to the courts, rather than to one party, and thereby the present occurrence of widely divergent opinions will be reduced to honest differences in the field. Expert opinion will gain credibility.

By assuring the achievement of the goals necessary to an effective civil adjudicatory system the proposal protects the interests of both the court and litigants. The proposal, however, also minimizes the imposition on the rights and interests of the expert: 1) the right to reasonable compensation for services performed; 2) the right to exercise freedom of choice; and 3) the right to be free from undue infringement or harassment.

Reasonable compensation is guaranteed the expert under the proposal. Just compensation is assured for services rendered, and witness fees in excess of those provided the ordinary witness are available. The proposal would in many jurisdictions more adequately protect the expert in this regard than present law.[102] Experts required to testify for ordinary witness fees as to opinions previously formed invariably

98. See note 91 & accompanying text *supra*.

99. It is not contended that the majority of experts actually perjure themselves to increase the amount of compensation they will receive, but merely that an expert develops a sense of responsibility to his or her employer, the litigant, encouraging unduly favorable testimony. *See* Holschuh, *supra* note 57, at 170-71; Note, 1977 WIS. L. REV. 603, 611-13 (1977); Peck, *supra* note 57, at 22 (stating: "Under present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouthpieces, the jury is more apt to be confused than enlightened by what it hears."). *See also* Crutchfield v. Davidson Brick Co., 55 Cal. App. 2d 34, 37-38, 130 P.2d 183, 185 (1942) (recognizing that large sums are a temptation to color testimony).

100. Even under the proposed statute all incentive for excessively partisan testimony is not removed. Experts who wish to be called again and again by counsel will continue to slant their reports and testimony to please their employers. With court control of compensation that kind of continuous relationship would be the only prime target for impeachment on cross-examination.

101. By encouraging more honest, accurate expert analysis of the case, each party's bargaining position will be better defined and presumably more realistic, thereby facilitating settlement.

102. See note 53 & accompanying text *supra*.

must prepare before testifying.[103] Enactment of the proposal would guarantee compensation for all services.

The expert's claim to witness fees in excess of those provided the ordinary witness, however, is debatable.[104] When experts actually testify they perform a duty practically indistinguishable from the ordinary witness, a duty for which the government is not required to pay. The fees provided by subsection (ii) of the proposal are, consequently, intended only to be nominal. The greater fees provided the expert witness simply recognizes the possible frequency of the imposition on the expert,[105] the expert's investment in his or her knowledge, and the earning potential of the expert's time.[106] In contrast, the compensation provided by subsection (iii) of the proposal *is* intended to fully compensate the expert. When preparation, examination or investigation is required the expert is truly unlike the ordinary witness and is performing a service which requires reasonable compensation.

The expert's freedom of choice and the resulting willingness or unwillingness to perform is protected under the proposal by the requirement that the expert may be compelled only when deemed necessary within the sound discretion of the trial judge. Judge Friendly, in writing for the second circuit in *Kaufman v. Edelstein*,[107] suggested:

> Appropriate factors for consideration—some pointing against a dispensation and some for one—would be the degree to which the expert is being called because of his knowledge of facts relevant to the case rather than in order to give opinion testimony; the difference between testifying to a previously formed or expressed opinion and forming a new one; the possibility that, for other reasons, the witness is a unique expert; the extent to which the calling party is able to show the unlikelihood that any comparable witness will willingly testify; the degree to which the witness is able to show that he has been oppressed by having continually to testify; and, undoubtedly, many others.[108]

Furthermore, the problem of the unwilling expert might not be as severe under the proposed statute as under present practice. Experts with the highest qualifications who typically would be unwilling to ap-

103. See note 96 *supra*.

104. 8 WIGMORE, *supra* note 9, § 2203.

105. "Thus, the most eminent physician might be compelled, merely for the ordinary witness fees, to attend from the remotest part of the district, and give his opinion in every trial in which a medical question should arise. Buchman v. State, 59 Ind. 1, 6 (1877). *See also* Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 935.

106. The greater value of an expert's time is strongly contested by Wigmore. 8 WIGMORE, *supra* note 9, § 2203.

107. 539 F.2d 811 (2d Cir. 1976).

108. *Id.* at 822. *See also* Note, *Compelling Experts to Testify: A Proposal*, 44 U. CHI. L. REV. 851, 859-66 (1977) (suggesting a comprehensive approach to compelling expert testimony).

pear in the partisan role might readily "respond to a call from the court as a public and professional duty."[109] This possibility seems even more likely under the proposed statute, whereby reasonable compensation for any services rendered would be guaranteed. Practical elements of the adversary system will also minimize the imposition on the expert. Counsel will only seek the assistance of an unwilling and probably hostile expert when either the testimony of a willing expert is unavailable or the unwilling expert's opinion is somehow unique.

The same factors which minimize the imposition on the expert's freedom of choice would operate to insure that no particular expert would suffer excessive imposition or harassment. Furthermore, once the duty to testify is recognized, courts can fashion rules and doctrines designed exclusively to alleviate any inequities that might arise as a result of extending the scope of compulsory process.[110]

The Constitutionality of the Proposed Statute

Recognizing that the proposal merely minimizes the imposition on the expert's rights and interests rather than absolutely protecting those rights may give rise to constitutional objections. The proposed statute, however, may withstand constitutional attack by virtue of the compensation provisions and the nature of the duty imposed. By guaranteeing compensation for any services which may be required and fees for any testimony given, the statute avoids violating the due process clause of either the fifth or the fourteenth amendments,[111] even in those jurisdictions which adhere to the property concept of an expert's knowledge or opinion.[112] The compensation provisions of the statute do not, however, dispel the possibility of a violation of the thirteenth amendment's prohibition of involuntary servitude. "Compensation for service may cause consent, but unless it does it is no justification for forced labor."[113]

109. Peck, *supra* note 57, at 26.

110. Once the expert is freed from the confines of rules designed to regulate the ordinary witness, rules addressed to the unique problems of the expert, such as the possibility of having constantly to appear, could be promulgated. For instance, modern techniques of visual and audio recording and transmission may offer an alternative to the need for time-consuming personal appearances. *See* Note, 42 MO. L. REV. 121, 122 (1977).

111. The language of the Supreme Court in Hurtado v. United States, 410 U.S. 578, 588 (1973), discussing the validity of incarceration of a material witness to a criminal action, is instructive: "[T]he Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed."

112. In those jurisdictions which adhere to the property theory of an expert's knowledge or opinion, however, the compensation provisions are required. By virtue of the guaranteed compensation constitutional dilemmas are avoided. *See In re* Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

113. Heflin v. Sanford, 142 F.2d 798, 799 (5th Cir. 1944) (conscientious objector ordered

An unwilling expert, compelled to prepare, examine, or investigate the facts of a case in order to form an opinion which would be useful to the court could allege a violation of the thirteenth amendment. "The answer [to such an allegation, however] lies in the broad principle that the thirteenth amendment has no application to a call for service made by one's government according to law to meet a public need . . . ."[114] The same fundamental assumption, the duty to testify, therefore, enables the proposal to withstand all constitutional attack.[115] If the underlying assumption is sound, that the expert owes a duty to the public when expert evidence is necessary to the proper administration of justice, then allegations of constitutional violations may be rejected.

Conclusion

The continuing controversy surrounding the role of the expert witness in civil litigation is a manifestation of the inability of present-day rules and doctrines, designed to govern the ordinary witness, to address adequately problems which are unique to the expert. Resolution of the controversy has been inordinately hampered by the issue of compensation.

The idea that the ordinary witness was once beyond the power of the courts to compel seems archaic today. In years to come, when the role of the expert witness is commonly accepted, the idea that the courts today permit expert testimony to be bought and sold will seem equally primitive. This Note has attempted to demonstrate that resolution of the controversy simply awaits the realization that the expert owes a duty to the courts and to the public and not to any one litigant. That realization, in turn, is founded on the recognition of the public need for the unbiased assistance of experts in an effective modern civil adjudicatory system. If that public need is not now apparent, as it should be, it will become apparent as the number and types of highly technical, legal, and factual issues multiply with the ever increasing complexity of society.

to perform alternative service not protected by Thirteenth Amendment prohibition against involuntary servitude).

114. *Id.*

115. In a long line of cases the Supreme Court has upheld governmental imposition on the liberty of citizens where a public need is served. *See, e.g.*, Butler v. Perry, 240 U.S. 328 (1916) (requiring able-bodied men to work on the roads not in violation of the thirteenth amendment); Klubnikin v. United States, 227 F.2d 87 (9th Cir. 1955), *cert. denied*, 350 U.S. 975 (1956); O'Connor v. United States, 415 F.2d 1110 (1969), *cert denied*, 397 U.S. 968 (1970) (upholding the alternative service provision of the Selective Service Act). *See also* Misner & Clough, *Arrestees as Informants: A Thirteenth Amendment Analysis*, 29 STAN. L. REV. 713, 717-25 (1977) (providing an overview of the thirteenth amendment).